

United States  
Circuit Court of Appeals

For the Ninth Circuit. 4

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CHARLES H. MOYER, as Trustee for the Western Federation of Miners, a Voluntary Unincorporated Association of Persons With Its Headquarters in the City and County of Denver, State of Colorado, CHARLES H. MOYER, C. E. MAHONEY and ERNEST MILLS, as Members of the Western Federation of Miners, a Voluntary Unincorporated Association of Persons With Its Headquarters in the City and County of Denver, Colorado,

Appellants,

vs.

THE BUTTE MINERS' UNION, a Corporation,  
Appellee.

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REPLY BRIEF.

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PETER BREEN,  
Solicitors for Appellee.

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*United States Circuit Court of Appeals for the Ninth  
Circuit.*

No. 2875.

CHARLES H. MOYER, as Trustee for the Western Federation of Miners, a Voluntary Unincorporated Association of Persons With Its Headquarters in the City and County of Denver, State of Colorado, CHARLES H. MOYER, C. E. MAHONEY and ERNEST MILLS as Members of the Western Federation of Miners, a Voluntary Unincorporated Association of Persons With Its Headquarters in the City and County of Denver, Colorado,

Appellants,

vs.

THE BUTTE MINERS' UNION, a Corporation,  
Appellee.

**Reply Brief.**

MAY IT PLEASE THE COURT: After Appellants had filed and served their brief and after appellee had done likewise, appellee's attorney received through the mails a copy of a brief bearing the same title as above, with the additional title of "Oral Argument and Authorities." An examination of the same discloses to appellee that it does not correctly quote the record in this case, the errors in this regard being so numerous that appellee deems it necessary to briefly call the Court's attention to at least some of them.

In the statement of facts referred to in the said brief the testimony of the witness Patrick Meaney during the trial, called in rebuttal by appellants, is given in part upon pages 3 and 4 thereof. The record discloses that appellee was a corporation organized and doing business for a period of fourteen years, and three years prior to that time an unincorporated body of workingmen before Mr. Meaney ever became a member, and he admits upon cross-examination all that he knew about what was done by the Butte Miners' Union prior to January, 1895, was only through hearsay, stating specifically upon cross-examination that "I know that you made the motion appointing the Committee because we had the People's Headquarters and it was your object to become the first President of the Western Federation of Miners, but we saw to it as members of the People's Board that we had enough men there in the Miners' Union Hall to not allow you even to attend the first convention and that you were not even elected as a delegate." (Referring to one of appellee's former members and appellee's present counsel.) (R. 476, 477.)

In the brief of Oral Argument and Authorities the writer attempts to give the impression that the Workingmen's Union, referred to by Mr. Meaney during his examination at the trial, was the same Workingmen's Union referred to back in 1878, when such a construction is not warranted by the testimony of Mr. Meaney, as appears from the record. (R. 475-478.)

Further on in the statement of fact there seems to be a studied attempt made to create the impression that the organization of the Federation was essential to the well-being of the Butte Miners' Union (appellee here), and reference is also made to Revised Codes of Montana, sec. 3889. The Court will observe that the section referred to relates to corporations generally, and is not the Code provision under which appellee was organized.

On page 8 of Oral Argument and Authorities, practically all the argument appearing on said page is not founded upon any testimony appearing in the record. For instance, we find this statement:

“In June, 1914, on the 13th day, there was such a reign of violence within the Butte Miners' Union (appellee here) that its property was destroyed and with it the charter issued in 1893.”

As stated above, there is no evidence whatever warranting a statement that there was any violence within the Butte Miners' Union.

Further on, on the same page the writer of Oral Argument and Authorities says:

“But the radical members, what are known as ‘direct-action men,’ men who believe the destruction of the physical evidence, the destruction of the principle, conceived the idea that by destroying the charter they could destroy the relations of the Butte Miners' Union.”

This conclusion of the writer is not based on any evidence whatever appearing in the record.

We find the same condition upon page 9 of Oral Argument and Authorities, wherein it says in part:

“On September 22, 1914, the Butte Miners’ Union, by majority vote of its members, forced its officers and directors to make an application for a re-issue of the charter.”

Herein we find for the first time the word “forced” used. Nothing appearing in the record that would warrant such a statement.

Further on, on the same page, reference is made to the application for a reissuance of the charter, that the corporation shall conform to all its provisions. Appellee claims, and the trial court so found, that there had been no reissuance of the charter destroyed. (R. 296-302.)

On page 10 we find a reference made to “conditions becoming so turbulent that a large number of the members of the Butte Miners’ Union petitioned the Western Federation to assume charge of its affairs.” The facts in relation thereto being that appellant, Mr. Moyer, and others associated with him, had, for the purpose of getting possession of the property of appellee, had after June 13 and 23, 1914, brought about an amendment to the Constitution of the Western Federation of Miners, wherein they provided that 10% of the membership could set aside the rule of the majority and substitute therefor the rule of the minority; citing some of the allegations set forth by those who signed the minority petition for Moyer to take charge of the affairs of a Montana corporation, but they neglected to state that when the matter was heard in the District Court of the



State of Montana, upon an Order to Show Cause, and when appellee here, through its proper officers, appealed to the Supreme Court of the State of Montana, the said Supreme Court rendered an opinion annulling said order and ordering the District Court to set it aside. (Ex. "O," R. 294.)

We further find on page 10 the statement "that constant, repeated, patient efforts on the part of the Western Federation were made to adjust the distressful affairs of this once great Union and to restore it to local control."

The record discloses that the only efforts made by the Western Federation was to get possession of appellee's property. These efforts being made by the aid of the State Court of Montana and the Federal Courts. (R., pp. 2-305.)

On page 11 we find the following reference:

"This statement of facts is the basis of the action now before this court wherein the Federation, not on its own account but as a Trustee for the more than 100 organizations composing the Federation. \* \* \* "

We say without fear of contradiction that nowhere in the record will the Court find any reference made to the 100 organizations or any other number.

We find on the same page and the top of the following page the statement, under the heading "Legal Issues Involved,"—

"The appellant herein seeks to enforce the trust imposed on it and to protect the interests not only of all the Locals but all those conserva-

tive members of the Butte Miners' Union that have been driven from it by the action of the malcontents and to prevent less than ten men from seizing the property of the Butte Miners' Union and wresting it from its benevolent purposes and converting it to their own personal use."

We again state that there is not a syllable of evidence anywhere in the record that would warrant a statement of this kind being made to this Court.

Reference is further made on page 12 to the Federation defending suits of the Butte Miners' Union. The witness Ernest Mills admitted that the suit in question and the only suit testified to by appellants was a joint suit of the Western Federation and Butte Miners' Union, wherein appellee was interested to the extent of \$25,000 and interest thereon for several years, and the Western Federation having a second mortgage on the same property.

Again, we find on page 13 of Appellants' Oral Argument and Authorities reference to "over 100 subordinate organizations composing the Federations" and a prior reference "usurpation of authority by the appellees, who intend to profit personally by this suit."

Further on, on the same page, we find an appeal for "Even-handed justice so that no recreant body in a time of trial and turbulence may wrest itself from the parent organization and by high-handed acts wreck an organization."



We again repeat that there is no evidence whatever in the record warranting the above statements.

On pages 13 and 14 we find the following:

“The character of the appellee in this suit is to seize and distribute to themselves personally the property of the Butte Miners’ Union.”

Again we repeat, nothing whatever in the record warranting this statement.

We further find on the same page the following statement:

“You will search the record in this case in vain for any action of the Butte Miners’ Union as a Union, looking toward the interposition of this plea but you will find declarations and clamor interposed by these defendants, that the appellee, sitting as a ‘Star-chamber body’ and using the name of the Butte Miners’ Union as a specific name under which to accomplish the purpose of the final disintegration of the Union, by preventing the proper Trustees from taking hold of the affairs of the Union and rehabilitating it.”

It is the same old familiar cry of “Stop Thief,” not warranted whatever by any facts in the record.

In support of the last statement, appellant cites the rule of *ultra vires* in its first or primary sense, to which citation appellee finds no fault, as the same emphatically sustains its, appellee’s position. But we desire to go a little further and call the Court’s attention to the following from the same authority:

“In the absence of a prohibitory statute, a corporation may dispose of its own property as it pleases to anyone, for any or no reason, subject only to the qualification that it may not do so, without express power in its behalf, against the wish of any single shareholder or may not do it so as to destroy the fund which creditors have a right to look to for payment. \* \* \*

Minnesota Threshing Co. vs. Langdon, 46 N. W. 310.

On page 16 of Appellants' Oral Argument and Authorities, in commenting upon certain provisions of the Constitution of the Western Federation of Miners, they indulge in conclusions, and would ask this Court to consider matters that do not at all appear in the record other than by the pleadings, there being no evidence whatever, that appellee can discover, referring to the action taken by at least a portion of appellants upon a petition signed by eighteen alleged former members of appellee. That matter was disposed of by both the District and Supreme Courts of the State of Montana upon an Order to Show Cause directed to defendants in the lower court and upon an Order to Show Cause, after petition filed, for Writ of Supervisory Control in the Supreme Court: (R. 136-294.)

On page 20 of Oral Argument and Authorities, Appellants refer to certain paragraphs of appellee's answer in the trial court. Replying to criticisms therein, would say that the said Answer was duly sworn to and appellee at the trial offered to prove all of the allegations therein set forth, which offer ap-

pears on Record, pages 259-265, and was vigorously opposed by appellants, and we take it are not before the Court.

We further find on said page the following reference by appellants:

“To the distressed in Michigan alone it paid out over \$1,000,000, during the year of 1914.

\* \* \* ”

There is no evidence whatever in the record supporting the above statement.

Further on, on said page the following reference is made:

“And for more than twenty years the Locals, varying from sixty to over one hundred and twenty, have each paid their share.”

Again we repeat there is no evidence in the record to support such a statement.

On page 21 of Oral Argument and Authorities we find the following:

“Possessed by an insane desire to destroy, the malcontents destroyed the property of the Butte Union and its books and papers and with those records where they cannot be reached the defendant (appellees) now come forward, not as representatives of the Butte Miners' Union, but as we assert for their individual aggrandizement, and interpose the plea of *ultra vires* of the Butte Union.”

Appellee admits that its property was destroyed, the records show that much, but if it appears to be the purpose of appellants to give this court the im-

pression that appellee's members are the one who destroyed the books, papers and records referred to, then appellee emphatically denies this statement and respectfully states to the Court that they were the victims of the said malcontents. To the latter part of this statement we again emphatically assert that there is no evidence whatever in the record warranting the statement above made.

On pages 26 and 27 of Oral Argument and Authorities, appellants, in support of their position, refer to section 4225, Code of Montana, 1907, wherein it is permissible for two or more of the associations mentioned in the said section to own real or personal property conjointly, and providing the method by which the same can be done, namely, by the two bodies or associations both incorporating. While appellants attempt to claim that the said section applies in the case at bar and have elaborately argued the case along said lines, they have evidently forgotten that the Western Federation of Miners never incorporated, and that the section in question has no application whatever.

On page 28 of Oral Argument and Authorities, at the top thereof, appellants refer to appellees as follows: "Here is a corporation wholly benevolent, in no way touching considerations of public policy, with a legal and equitable contract executed for over twenty years and now a dissolved association, declaring that it had no power to make the contract and asking to be relieved therefrom not by the association but by the nominal officers joined with other appellees herein." If appellants intend to give the Court the impression that the appellee corporation

is dissolved, we again repeat that such a statement is not warranted by any evidence whatever appearing in the record.

Further on, on said page 28, appellants attempt to dictate rules of pleading for appellee, and state what the trial court would have done for appellee had appellee followed the suggestions referred to for its benefit by appellants. Replying to same, appellee will say that it is well satisfied with the results obtained at the trial of the said action and respectfully submits that it can see no reason for the decision of the trial court being disturbed by this Court.

On page 29 of Oral Argument and Authorities, appellants refer to what they have done to adjust the troubles between them and appellee, and cite Tr. 194-208 therein showing that their principal efforts, by way of adjustment, were directed to getting possession and control of appellee's property, the same as now, but do not mention what happened to them when the matter came before the Supreme Court of the State of Montana (Exhibit "O," Rec. p. 294), which we submit to the consideration of this Court.

On the same page they also refer to "Con-Joint Associations," which we again submit has no application herein.

On page 33, under the title, "Reception of the Charter of 1914," of Oral Argument and Authorities, appellants use the following language:

"Briefly, the Union had destroyed its charter in the turbulent times prevailing that year; they applied for and received a reissuance of the Charter."



We again repeat there is no evidence whatever for the conclusion stated, namely, that the Union had destroyed its charter. We further state that the trial court, besides deciding other points at issue in appellee's favor, found there was no reissuance of the charter in question. (Tr. 296-302.)

Fed. Rep. —, P. —.

On page 35 of Appellants' Oral Argument and Authorities, we find the following:

"Nothing is done. The Federation continued to send its blanks and everything moved along as usual until June, 1915, when the schism occurred and the appellees decided to break the contract."

Replying to same, we call the Court's attention to the fact that appellants by using the word "appellees" attempt to convey the impression that it is not a corporation, but a number of individuals that is appellee here. We further call the Court's attention to the testimony in the record contradicting the same.

The witness Pat Leahy testified on behalf of appellee as follows:

Q. Well, did you or did the Butte Miners Union, a corporation, receive any correspondence or were they in any manner recognized or received any quarterly reports from the Western Federation of Miners after this month of October, 1914?

A. No, sir.

Q. Were they in any manner recognized by the Federation after the letter written by Mr.



O'Neal, except by lawsuit, since the date of that letter?     A. No, sir. (R. 443-444.)

The witness Pat Lee, called on behalf of appellee here, testified as follows on direct examination:

My name is Pat Lee; I am a miner, having resided in Butte going on seventeen years.  
\* \* \* I have been a member of the Butte Miners' Union since May, 1898. Plaintiff's Exhibit "C" (R. 107) contains my handwriting and is a letter from me to Mr. Mills, bearing date of November 24, 1914. After the mailing of that letter the Butte Miners' Union, a corporation, was never able to receive any communication or any recognition or any reports that the Constitution provided should be sent to the various Locals from the Western Federation. I did not write for them.

Q. Was there anything of an official character passed between the Butte Miners' Union and the Federation—I mean of a fraternal, not a legal, character?

A. A petition for the recall of the officers; that petition for recall was that the Butte Miners' Union drew up a petition to recall Charles H. Moyer, President of the Western Federation of Miners and John P. Lowney, a member of the Executive Board and against Miller of the Executive Board. (R. pp. 458-459.) I think it was about a week after this action, the filing of the petition, that action was commenced by the Federation to secure control of the Butte Miners' Union, property and affairs. The

Butte Miners' Union, a corporation, was conducted as a corporation all of the time, after this action and prior thereto. She is a corporation all of the time, the Butte Miners' Union.

Q. But I mean under the seal of the corporate organization instead of using the other?

A. Yes, we had two seals for use, the corporation seal for legal purposes and the Western Federation seal on anything we sent out to the Western Federation Locals. (R. pp. 462-463.) The Western Federation of Miners never made a demand upon the defendant corporation here for per capita tax after the receipts of the letter, Plaintiff's Exhibit "C," or the letter written to me referring to the charter. They never made any demand at all, and furnished no information and no reports of any kind. I would also like to state that we used to get monthly blanks for the monthly reports, and when I wrote that letter the monthly blanks did not come for the month of November. We used to get a monthly blank for the written report and when I wrote that the blank did not come for the month of November and never after for the month of November, nor after that. (R. p. 464.)

On page 37 of Appellants' Oral Argument and Authorities, we find the following:

" \* \* \* W. J. Wicks was Secretary and continued to be Secretary for some years and that the minutes of the Federation show no discussion of the Charter."

Replying to same we call the Court's attention to the fact that nowhere in the record is there any testimony as to any discussion of the charter. The discussions therein referred to being at meetings of the Butte Miners' Union, a corporation, appellee here. The evidence further clearly showing that all the records of appellee were destroyed on June 13, and June 23, 1914, when its hall, which was also its place of business, was blown up and destroyed. The testimony of the witness, Mr. Deeney, shows that "There was a record kept by appellee. I think that was made a record; yes, it was a matter of consequence and would be. \* \* \* I do not know what happened to it. We understood they were all destroyed on the 13th of June, 1914, or the major portion." (R. pp. 431-432.)

The only record we find that in any manner refers to a discussion of the charter is contained in Plaintiff's Exhibit "J." (R. pp. 480-568.) Quoting from page 500 we find the following:

"Committee on Charter reported form of charter and report adopted as amended."

This is the only reference to the adoption of any form of charter, and what amendment was offered can only be left to conjecture.

On page 39 of Appellant's Oral Argument and Authorities, we find the testimony of the witness James Maher in part as follows:

"I saw the original Charter (Tr. 341) and it was identical with the Aspen charter."

The witness Mr. Maher, on cross-examination, in addition to the above, testified as follows:

"I saw the charter of the Butte Miners' Union No. 1 hanging on the wall but I don't think I ever read it."

On page 41, under the title "Summary of Facts," we find the following:

"That in the years that passed those Locals numbered from 17 to 60 and now over 100 difference."

We again call the Court's attention to the fact that there is absolutely no evidence in the record upon which to base such a statement. All that we can find any place in the record is a statement in the minutes of the Convention at which the Federation was organized that a motion was made, which motion is as follows:

"On motion a committee of one member from each Union represented in this body be appointed to draft a constitution and by-laws."  
(R. p. 483.)

On Record, p. 484, we find that fifteen persons were appointed in compliance with said motion. That is all that in any manner shows the number of Unions present at the first Convention, and as repeatedly stated no evidence whatever of the number of Locals since said time.

On page 42 of Appellants' Oral Argument and Authorities (the concluding page), we find the following:

" \* \* \* If it should supinely permit the  
appellees to secede from the order. \* \* \* "

We again call the Court's attention to the studied efforts of appellants to refer to appellee as appellees, without any authority therefor appearing in the record.

In the above brief statement we have attempted to call the Court's attention to the numerous misleading statements quoted in the brief in question; in so doing appellee has carefully and repeatedly examined the record to be sure of its position in this matter. While numerous authorities are cited, we will not at this time attempt to review them, other than to say that, in appellee's judgment, the same are not applicable to the case now before the Court.

Among other cases cited in support of appellants' views is the case of Schubert Lodge No. 118 K. of P. etc. vs. Schubert Kranken Unterstuetzungs-Verein, 38 Atl. 347, which case distinguishes between the Local organizations, who are incorporated under the laws of their respective States, and similar organizations that are not incorporated. In the opinion of the Court we find the following:

"Complainant is a subordinate to the Grand Lodge of New Jersey. The bill alleges and the answer admits that the complainant here is a corporation created and existing under the laws of the State of New Jersey. In that respect the case differs from the case developed in Grand Lodge K. P. vs. Germania No. 50 K. P., where Germania Lodge was a nonincorporated Association. \* \* \* (The case last referred to also cited by appellants in their brief immediately preceding this case and decided by the same



court and on the pages preceding the page on which this opinion commences). It is not disputed but that these funds were the result of the accumulation of dues paid in by members of the order, and that they became at once impressed with a trust, the terms of which are to be found in the constitution, laws and by-laws of the order and that they cannot be applied to any use except those defined in these instruments. These uses are, first to pay the expenses of the lodge and dues to the Grand and Supreme lodges; second, to make payments to sick members; and third, payment of expenses of burial of deceased members. \* \* \* In the first place it is to be observed that the Schubert Lodge, being not only organized under the constitution and laws of the order but also incorporated under the laws of the State, the constitution and laws of the order not only defined the terms upon which the funds of the lodge were held in trust but also formed a contract between the different members of the lodge and a breach of the contract between the Schubert Lodge and the Supreme Lodge, if there ever was such a contract, could not have the effect of altering the terms of the trust and contract between the members of that Lodge; each member of the Lodge was interested in those funds and none of them could be diverted from the purpose to which they were devoted without the consent of every individual member. \* \* \* The complainant corpora-



tion has never lost its identity and organization. The funds in question belong to it and must be so decreed, with costs against the defendants.”

We respectfully contend that the last case very strongly favors the position of appellee. Its organization is intact; it is a Montana corporation, authorized to and doing business under the laws of said State; its funds were collected in the manner referred to in this case to be used for the same purposes and cannot be diverted to any other use. We may search the constitution of appellants, Western Federation, in vain to find wherein there is any provision for caring for the sick or burying the dead. Therefore it would be impossible for them to comply with the requirements of constitution of appellee and would be diverting the funds to an unlawful use.

Appellants have cited numerous cases showing where Courts are becoming more liberal in construing the old rule against *ultra vires* contracts. For said purpose they cite section 681, Cook on Corporations. The concluding paragraph of the section in question reads as follows:

“In the Federal courts, on the contrary, the old rule against *ultra vires* contracts is upheld in all its rigor and applied with all its severity; the tendency of modern jurisprudence to relax on that subject finds no favor in the Federal courts.”

In the case of McCormick vs. Market Bank, 165 U. S. 538, in passing upon the question of *ultra vires*, the Court finds as follows:

“The doctrine of *ultra vires*, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this Court has often recognized and affirmed, upon three distinct grounds: The obligation of anyone contracting with a corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subject to risks which they have never undertaken and above all the interest of the public, that the corporation shall not transcend the powers conferred upon it by law.”

We again, as in our first brief, respectfully submit to this Court that the lower Court committed no error, and that its judgment and decree should be affirmed.

Respectfully,  
PETER BREEN,  
Attorney for Appellee.